In the Supreme Court of the United States.

OCTOBER TERM, 1910.

THE UNITED STATES, APPELLANT,
v.
READING COMPANY ET AL. } No. 846.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

MOTION TO ADVANCE.

This is a case under the act of July 2, 1890, the antitrust law. The principal defendants are Reading Company, a holding corporation, Philadelphia and Reading Railway Company, The Central Railroad Company of New Jersey, Lehigh Valley Railroad Company, The Delaware, Lackawanna and Western Railroad Company, Erie Railroad Company, and The New York, Susquehanna and Western Railroad Company, which transport 77 per cent of the anthracite coal moving from the mines, and their respective subsidiary coal companies or departments, which control over 87 per cent of all the anthracite coal in the ground and produce approximately 60 per cent and market approximately 70 per cent of the annual supply; and

many so-called independent anthracite coal-mining companies, which have been made parties because the petition challenges the legality of contracts under which their output is perpetually controlled by the before-mentioned defendants.

The petition, filed June 12, 1907, charges that the defendants have entered into a combination and conspiracy with the general object of ending competition among themselves in the transportation and sale of anthracite coal among the States and of preventing the sale of the independent output in competition with their own, designing thereby to secure to themselves a virtual monopoly; and that in development thereof the defendants, all of them in some instances and particular groups in others, engaged in the following-described acts, among others, each in violation of the act of Congress not alone because part of the larger conspiracy but because in itself a restraint upon trade and commerce among the States.

(*a*) The defendant railroads agreed among themselves upon a uniform contract, known as the 65 per cent contract, to be entered into by them or their coal companies with the independent operators along their respective lines, under which they would take over the output of independent mines for a stated percentage of the prices at New York Harbor, with provisions that would enable them to regulate and control absolutely the production and sale of the output from such independent mines until exhausted; and that by virtue of their control of all the means of transportation

from the anthracite mines to tidewater except the railroads of the Pennsylvania Railroad Company and the New York, Ontario and Western Railway Company, the defendant railroads were able to draw a majority of the independent operators along their lines into making these contracts.

(*b*) In 1898 the defendants Erie Railroad Company and The New York, Susquehanna and Western Railroad Company, operating competitive railroads from the anthracite coal fields to tidewater at New York Harbor, together with their respective subsidiary coal companies, were combined, and the business formerly done by them as competitors monopolized, through the acquisition by the Erie Railroad Company, in exchange for its own shares, of a large majority of the shares of The New York, Susquehanna and Western Railroad Company.

(*c*) In January, 1901, the defendants Philadelphia and Reading Railway Company and The Central Railroad Company of New Jersey, operating competitive railroads from the anthracite coal fields to tidewater at New York Harbor and transporting about 35 per cent of the anthracite coal shipped to market, and the respective coal companies united in ownership with them, namely, The Philadelphia and Reading Coal and Iron Company and The Lehigh and Wilkes-Barre Coal Company, owning or controlling about 63 per cent of the entire anthracite deposits, were combined, and the business formerly done by them as competitors monopolized, through the acquisition of a majority of the shares of the said Cen-

tral Railroad Company of New Jersey by the defendant Reading Company, a holding corporation, which already owned all the shares of Philadelphia and Reading Railway Company and The Philadelphia and Reading Coal and Iron Company.

(*d*) Having long been dissatisfied with the excessive freight rates and discriminatory practices in the transportation of anthracite coal, in 1898 a large number of independent operators in the Wyoming region (the most productive of the three trade divisions of the anthracite fields, the others being the Lehigh and the Schuylkill regions), chief among them Simpson & Watkins, a firm owning eight collieries with an annual output near 1,500,000 tons, decided to promote the construction of a new railroad from the coal regions to tidewater, which would have introduced competition into the transportation of anthracite coal and at the same time permitted the independent output, theretofore at the mercy of the railroads themselves in the coal business, to be sold in the markets in competition with the coal of the railroad coal companies; and to that end the said independent operators organized, under the laws of Pennsylvania, the New York, Wyoming and Western Railroad Company, which had secured pledges of tonnage, had had surveys of its proposed line made, and had purchased several thousand tons of rails, when the defendants Reading Company, The Central Railroad Company of New Jersey, Lehigh Valley Railroad Company, The Delaware, Lackawanna and Western Railroad

Company, Erie Railroad Company, and the New York, Susquehanna and Western Railroad Company, conspiring to defeat the project and prevent the competition it would introduce and to pool among themselves the tonnage moving from the collieries of Simpson & Watkins, purchased or agreed to purchase in stated proportions the capital stock of The Temple Iron Company, an old corporation brought forth for the occasion, and caused it to acquire the aforesaid collieries with its securities issued especially for the purpose. Whereupon, weakened by the loss of these supporters, the proposed railroad fell through..

(*e*) In the following year, 1899, after the abandonment of the projected New York, Wyoming and Western Railroad, the independent operators of the Wyoming region made a further attempt to promote a competing railroad, and the Pennsylvania Coal Company, the largest and most powerful of them, producing annually 2,000,000 tons, and controlling the Erie and Wyoming Valley Railroad Company, which operates a railroad from a point near Scranton in the coal regions to Hawley, Pa., having secured sufficient pledges of tonnage from other independent operators, undertook to extend the said Erie and Wyoming Valley Railroad from Hawley to Rondout on the Hudson River, making a connected independent line from the coal regions to tidewater; and to that end organized, under the laws of New York, The Delaware Valley and Kingston Railroad Company, obtained from the railroad commission of that State, over the

opposition of other railroads, a certificate that the proposed road was necessary, a condition precedent to its construction, and purchased for a roadbed the abandoned Delaware and Hudson Canal, extending from Rondout, on the Hudson River, across the State of New York, to Lackawaxen, Pa. Whereupon the defendant Erie Railroad Company, through the agency of J. P. Morgan & Co., acquired the capital stock of the Pennsylvania Coal Company, the Erie and Wyoming Valley Railroad Company, and the Delaware Valley and Kingston Railroad Company, issuing for the purpose its first preferred shares of the par value of $5,000,000 and its bonds in the sum of $32,000,000, with the result that this renewed attempt to construct an independent railroad from the mines and thereby introduce competition in the transportation and sale of anthracite coal was likewise defeated.

The petition prayed specific and general relief appropriate to the case.

Under authority of the act of February 11, 1903, "To expedite the hearing and determination of suits in equity * * * under the act of July 2, 1890," etc., the Attorney General filed a certificate stating that in his opinion the case was of general public importance. It was accordingly heard before the three circuit judges of the Third Circuit on February 21, 22, 23, and 24, 1910, and their three separate opinions were handed down on December 8 last.

The final decree, entered December 20 last, adjudged that the beforementioned defendant rail-

roads, including defendant Reading Company, by and through the defendant The Temple Iron Company, are joined together in a combination in restraint of trade and commerce among the States in violation of the act of July 2, 1890, and enjoined them from continuing therein.

But it dismissed the petition as to the vitally important charges (1) that the defendants are parties to a combination with the general object of ending competition, in violation of the act of Congress; (2) that the so-called 65 per cent contracts by which the defendants held control of the independent output are in violation of the act of Congress; (3) that the combination of Erie Railroad Company and New York, Susquehanna and Western Railroad Company and their subsidiary coal companies is in violation of the act of Congress; (4) that the combination through a holding company of Philadelphia and Reading Railway Company and Central Railroad Company of New Jersey, and their subsidiary coal companies, is in violation of the act of Congress; and (5) that the acquisition and holding by Erie Railroad Company of the capital stock of the Pennsylvania Coal Company and Delaware Valley and Kingston Railroad Company is in violation of the act of Congress. From this part of the decree the Government has appealed to this court and the record has been duly filed.

The case is one of those the expediting of which is provided for by the act of February 11, 1903, and, presenting as it does the question of the legality of various devices by which carrier companies first

secure to themselves a virtual monopoly of a prime necessary of life produced along their respective lines, and then suppress competition amongst themselves both as carriers and sellers of such commodity, its early determination is of great public importance.

In behalf of the Government I therefore respectfully ask that the case be advanced and assigned for hearing as soon as the convenience of the court will permit.

Notice of this motion has been served on opposing counsel.

F. W. LEHMANN,
Solicitor General.

JANUARY, 1911.

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FILED.
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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 198.

THE UNITED STATES,

Appellant,

vs.

READING COMPANY, THE MERCANTILE TRUST COMPANY *et al.*,

Appellees.

BRIEF FOR THE MERCANTILE TRUST COMPANY, Appellee.

WILLIAM W. GREEN,
Of Counsel for said Appellee.

THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1911.

THE UNITED STATES, Appellant, AGAINST READING COMPANY, THE MERCANTILE TRUST COMPANY, *et al.*, Appellees.	No. 477.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Brief for The Mercantile Trust Company, Trustee under the mortgage of the Erie Railroad Company, Dated February 1, 1901.

In the original petition filed by the United States (Record, Vol. I, p. 11) The Mercantile Trust Company was not made a party defendant, nor is it mentioned in any of the allegations contained in the petition. The petitioner amended its original petition by adding as defendants therein certain persons and corporations including The Mercantile Trust Company, the only allegation in reference to the Trust Company being the following:

> "The said Mercantile Trust Company, as Trustee under a collateral trust mortgage,

> being the holder of the legal title to certain shares of the capital stock of the New York, Susquehanna and Western Railroad Company which in the original petition the Court is prayed to enjoin the defendant the Erie Railroad Company—the equitable and beneficial owner thereof—from voting or receiving dividends upon."

The defendant filed a separate answer to the petition as amended, and among other defences, by Paragraph VII thereof, asserted and alleged the defence that the petition was multifarious. (Record, Vol. 1, p. 151.)

The mortgage referred to in the amendment to the petition is dated the 1st day of February, 1901, and was executed by the Erie Railroad Company, and provided for an issue of bonds not exceeding in the aggregate thirty-six millions of dollars, payable on the 1st day of February, 1951, bearing interest at the rate of four per cent. per annum. Under this mortgage there were pledged, and have been deposited with the Trustee, certificates for 100,000 shares of the capital stock of the Pennsylvania Coal Company, 30,000 shares of the stock of the Erie and Wyoming Valley Railroad Company and 2,500 shares of the Delaware Valley and Kingston Railroad Company, those being the companies and stocks referred to in paragraph VII, subdivision (*e*) of the petition; also 66,000 shares each of the preferred and common stocks of the New York, Susquehanna & Western Railroad Company, being the company and the stocks referred to in paragraph VII in subdivision (*b*) of the petition (Record, Vol. V, pp. 1009-10). Under this mortgage there have been issued from time to time, and were outstanding at the time of the taking of the testimony in this cause, bonds amounting in the aggregate to $31,915,000, which are held by investors widely scattered throughout the country

(Record, Vol. V, p. 1011). Under the terms of the mortgage the Erie Railroad Company is entitled to vote the deposited stocks and collect the dividends thereon until default under the mortgage (Record, Vol. V, p. 1013).

I.

THE CLAIM THAT THE ACQUISITION OF THE STOCKS OF THE PENNSYLVANIA COAL COMPANY, THE ERIE & WYOMING RAILROAD COMPANY AND THE DELAWARE VALLEY AND KINGSTON RAILROAD COMPANY CONSTITUTE SEPARATE AND INDEPENDENT VIOLATIONS OF THE ACT OF JULY 2, 1890, IS NOT MADE IN THE PLEADINGS AND NO RELIEF CAN BE GIVEN IN RESPECT THERETO IN THIS PROCEEDING.

It is nowhere charged in the petition, nor does it appear in the proof, that The Mercantile Trust Company or any of the bondholders who invested large sums of money in the bonds was cognizant of or was or is in any respect a party to any of the alleged unlawful combinations or conspiracies in the petition charged, the only allegation concerning The Mercantile Trust Company, and that one simply of description and identification, being that it was the holder of the legal title to the shares of the capital stock of the New York, Susquehanna & Western Railroad Company. There is no allegation in the petition that it held the stocks of the Pennsylvania Coal Company or of the Delaware Valley and Kingston Railroad Company or the Erie and Wyoming Valley Railroad Company, although these latter facts appear from the testimony.

Paragraph VII of the petition begins with a statement of the prices of anthracite coal, and then alleges:

> "Whereupon, in violation of the provisions of Sections 1 and 2, respectively, of an Act of Congress approved July 2, 1890, * * * the defendant, the Reading Company, and the defendant carriers, and the defendant coal companies, * * * entered into an agreement scheme combination, or conspiracy, by virtue whereof they acquired the power to control, regulate, restrain and monopolize and have controlled, regulated, restrained and monopolized, not only the production of anthracite coal, but its transportation from the mines in Pennsylvania to market points in other States and its price and sale throughout the several States, with the result that competition * * * has been wholly suppressed and the price thereof to consumers greatly enhanced."

Then follows the allegation that *"as steps in the development of the illegal combination and in furtherance* of its illegal purposes the defendants herein named, or some of them, engaged in and became parties to the following additional acts, schemes and contracts among others in violation of the aforesaid Act of July 2, 1890." (The italics are ours.) Then follow various subdivisions designated (*a*), (*b*), (*c*), (*d*) and (*e*), each of which, it will be noted, charges various transactions as being *steps* in the development of and in furtherance of the general combination and conspiracy, one of such steps being the acquisition by the Erie Railroad Company of the stocks of the Pennsylvania Coal Company, of the Erie and Wyoming Valley Railroad Company and the Delaware Valley and Kingston Railroad Company, charged in subdivision (*e*).

Subdivision (*e*) alleges simply the acquisition by the Erie Railroad Company of the shares of stock of the three other companies as the "other means" resorted to for the purpose of defeating a projected independent railroad from the anthracite region to tidewater, and as "thereby defeating the construc-

tion of the proposed independent railroad to tidewater and again preventing the introduction of competition in the transportation of anthracite coal, &c." (Record, Vol. I, p. 24).

It is clear, it seems to us, that the pleader had not in mind, nor can the language used in subdivision (*e*) be construed to allege, any claim that such acquisition of these stocks was an offense against the Act, except as a part or a step in the general combination alleged in the first part of Paragraph VII. Nor does the petition intimate in any way to this appellee, nor to the Erie Railroad Company, its mortgagor, that this issue was tendered or would be raised.

A comparison of the allegations of subdivision (*e*) with other allegations contained in other subdivisions of Paragraph VII make it clear that such was the intent of the pleader and this appellee was entitled to assume that no separate and independent offense was charged and that no relief would be asked on account of the acquisition of the stocks referred to in subdivision (*e*) by the Erie Railroad Company as a separate and independent offense against the Act.

In subdivision (*b*) of Paragraph VII the pleader alleges as one of the steps in the general conspiracy the acquisition by the Erie Railroad Company of the stocks of the New York, Susquehanna & Western Railroad Company, owning an alleged competitive railroad line, and then goes on to allege that irrespective of the general agreement or combination the Erie Railroad Company, by issuing shares of its own capital stock in exchange for a majority of the shares of the capital stock of the New York, Susquehanna & Western Railroad Company, "and thereby acquiring control and mastership of the latter, monopolized the transportation between the several States formerly carried on by the two companies as competi-

tors, and in so doing violated Section 2 of the aforesaid Act of July 2, 1890."

In subdivision (*c*) the acquisition directly or indirectly by the Reading Company of the capital stock of the Central Railroad Company of New Jersey is charged in substantially the same language as a separate and distinct offense against the Act. There is no such charge of a separate and independent offense against the Act set up in subdivision (*e*) in reference to the acquisition of the stocks of the Pennsylvania Coal Company, the Erie and Wyoming Valley Railroad Company and Delaware Valley and Kingston Railroad Company.

The issue or claim that the acquisition by the Erie Railroad Company of the stocks of the last-named companies in any way constituted of itself a separate and independent offense against the Act, in addition to being one of the steps in the development of the general combination and conspiracy alleged in the petition, was not tendered to this appellee by the pleadings, made the subject of a specific prayer in the petition or suggested by any of the testimony taken in the cause or otherwise until the filing of the brief of counsel for the United States upon the argument in the Circuit Court, which contained the first intimation anywhere made in the conduct of the case in the Court below that the United States claimed that the acquisition and holding of these stocks constituted in any respect a separate and independent violation of Sections 1 and 2 of the Act of July 2, 1890. In that brief, which is on file and which has been submitted to this Court, in the statement of relief, the Court is asked to decree (p. 347):

> "Sixth: That the shares of the Pennsylvania Coal Company and of the Delaware Valley & Kingston Railroad Company, owned by the defendant Erie Railroad Company were acquired and held in violation

> of said Act, and the Erie Railroad Company is enjoined from voting such shares and from receiving any dividends or other profits arising therefrom, etc."

This is apparently the result of an afterthought on the part of counsel for the United States, which they had not in mind at the time that the petition was prepared and filed or during the taking of testimony, but was proffered upon the hearing of the cause, on the supposition, apparently, that on some theory or in some way the Circuit Court might be induced to grant the relief suggested by the brief in the same manner that it is suggested that it be decreed that the shares of stock in Coxe Brothers & Company, Inc., were acquired by the defendants Lehigh Valley Railroad Company or Lehigh Valley Coal Company in violation of the Act, and that each of the said companies be enjoined from voting the same or receiving any profits arising therefrom, when such acquisition is not mentioned in the petition. (Opinion of Lanning, *J.*, Record, Vol. I, p. 464.)

The Court below disposed of this claim of a separate and independent offense against the Act by declining to consider it, on the ground that there was no specific prayer in the petition for relief as to this particular transaction. (Opinion of Lanning, *J., loc. cit.*)

In the statement of the "outline of the relief sought in this Court" contained in the brief for the United States (p. 369), this Court is asked to enter a like decree in respect to the shares of these companies owned by the Erie Railroad Company, as was asked in the Court below, and for the first time it is suggested that a similar decree be made in respect to the stock of the Erie and Wyoming Valley Railroad Company. Counsel for the United States contend in this Court (Brief, pp. 354 *et seq.*), that the prayer for general relief contained in the

petition was sufficient to bring the matter before the Court for consideration and determination and to justify the entry of a decree on the claim set up in the brief for the United States in the Court below, and cite numerous cases in support of that position. We submit that an examination of the cases cited by counsel discloses no such situation as exists in this case.

Furthermore, it is at least questionable, under the Assignments of Error filed on behalf of the United States, whether the relief asked for by counsel can be granted. Two only of the Assignments of Error (Nos. VII and X, Record, Vol. I, pp. 471, 472) in any way refer to the acquisition of the stock of the Pennsylvania Coal Company by the Erie Railroad Company, and one only (No. VII) to the acquisition of the stock of the Delaware Valley & Kingston Railroad Company by the same company.

Assignment of Error No. X deals with the holding by the defendant Erie Railroad Company of the capital stock of the Pennsylvania Coal Company as in furtherance of the general combination and conspiracy, and cannot therefore be considered in connection with the claim for relief against the holding of the Coal Company's stock as a separate and independent offense against the Act.

Assignment of Error No. VII reads:

> "In failing and refusing to find and adjudge, *as charged in paragraph VIIe of the original petition*, that the acqusition and holding by the defendant Erie Railroad Company of substantially all the capital stock of the defendant The Pennsylvania Coal Company and of the Delaware Valley & Kingston Railroad Company was and is in violation of the aforesaid Act of July 2, 1890, and in failing and refusing to grant appropriate relief thereunto, and in dismissing the petition as to that charge." (Italics are ours.)

The Assignment of Error, it will be noted, is limited by the words in italics, and an examination of Paragraph VII*e* will nowhere disclose any charge that the acquisition and holding by the Erie Railroad Company of the stocks therein mentioned constituted in any way a separate and independent offense against the Act. Counsel for the United States, having filed its Assignment of Error, thus limited, cannot urge in this Court the granting of a decree finding illegal the acquisition and holding by the Erie Railroad Company of the stocks mentioned therein except as a part of the general combination and conspiracy, and no decree should be directed by this Court holding that the acquisition by the Erie Railroad Company of the stocks mentioned in Assignment of Error No. VII is unlawful as a separate and independent violation of the Act and granting relief against such holding.

There has not been assigned as error the failure and refusal of the Circuit Court to declare the holding by the Erie Railroad Company of the stock of the Erie and Wyoming Railroad Company unlawful, and yet, as the result, no doubt, of a further afterthought, counsel for the United States now ask this Court, and for the first time in the conduct of this case, to direct a decree declaring such holding unlawful, and enjoining the Erie Railroad Company from voting the shares of stock of the Erie & Wyoming Valley Railroad Company and from receiving any dividends or profits arising therefrom.

II.

THE PETITION IS MULTIFARIOUS IN THAT IT CHARGES AS UNLAWFUL THE HOLDING OF THE STOCK OF THE NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY AS A PART OF THE GENERAL COMBINATION AND CONSPIRACY, AND ALSO CHARGES AS UNLAWFUL SUCH HOLDING AS A SEPARATE AND INDEPENDENT OFFENSE, AND SHOULD IT BE HELD SUFFICIENT TO SUSTAIN A DECREE THAT THE HOLDING OF THE STOCK OF THE PENNSYLVANIA COAL COMPANY, THE ERIE & WYOMING VALLEY RAILROAD COMPANY AND THE DELAWARE VALLEY & KINGSTON RAILROAD COMPANY BY THE ERIE RAILROAD COMPANY IS UNLAWFUL AS A SEPARATE AND INDEPENDENT OFFENSE AGAINST THE ACT, THE PETITION WOULD BE MULTIFARIOUS IN THAT RESPECT.

III.

THE OBJECTION IN THE COURT BELOW TO THE PETITION ON THE GROUND OF MULTIFARIOUSNESS WAS RAISED IN THE PROPER MANNER AND AT THE PROPER TIME.

The petition contains no allegations of any conspiracy in which this appellee is alleged to have been a party, nor until Paragraph VII of the petition is reached is there any allegation of any combination or conspiracy on the part of the Erie Railroad Company, its mortgagor, and the only allegations in that regard with which this appellee is concerned are to be found in subdivision (*b*)

and subdivision (*e*), the former as above noted, containing the allegation in reference to the acquisition by the Erie Railroad Company of the stocks of the New York, Susquehanna & Western Railroad Company and subdivision (*e*) containing the allegation in reference to the acquisition by the same company of the stock of the Pennsylvania Coal Company, the Erie and Wyoming Valley Railroad Company and the Delaware Valley and Kingston Railroad Company.

After having been brought into the case by amendment, this defendant duly filed in proper time its separate answer herein on January 4, 1908, and after making the necessary admissions and denials of matters of fact and denying the charges of combination, confederacy or conspiracy charged against it in the petition, set up by Paragraph VII of said answer the following:

> "And by protestation not confessing or acknowledging all or any of the matters and things in said petition contained to be true in such manner and form as the same are therein alleged, save as they are hereinbefore acknowledged and confessed, this defendant for a further and additional answer avers and alleges:
>
> "(1) That it appears by said petition that this suit is brought against this defendant and the other persons and corporations named as defendants therein for distinct causes and matters in several and many of which this defendant is not interested or concerned, and that said petition is therefore multifarious.
>
> "(2) That it appears by said petition that this suit is brought against this defendant and the other corporations and individuals named as defendants therein for distinct matters and causes, in several whereof the several defendants are not in any manner interested or concerned, and in respect whereof this suit can be proceeded against

> it to a hearing and decree without the presence of any of the other defendants, and that said petition is therefore wholly multifarious." (Record, Vol. I, p. 151.)

A number of the other defendants to the petition raised the same defense by appropriate pleading embodied in their answers, and counsel for the United States did not set down for argument the demurrer included in defendant's answer, but filed its general replication thereto on January 28, 1908 (Record, Vol. I, p. 333).

In spite of the failure of counsel for the United States to set down the demurrer contained in its answer for argument, the question raised by such demurrer was urged upon the attention of the Court below by some of the many defendants by appropriate motions (Record, Vol. I, pp. 383, 386). These motions, however, were postponed by the Court until the final hearing of the cause (Record, Vol. I, p. 442). Therefore, this appellee should have been allowed by the Court below, as a matter of right, to argue the question of multifariousness as of the date upon which the demurrer included in its answer was filed. This, it seems to us, follows from the failure of the counsel for the United States to set down the demurrer for argument and by the filing of a general replication and proceeding to take testimony.

Rule 32 of the Rules of Practice of Courts of Equity of the United States, which reads as follows:

> "The defendant may at any time before the bill is taken for confessed, or afterward with the leave of the Court, demur or plead to the whole bill, or to part of it, and he may demur to part, plead to part, and answer as to the residue; but in every case in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the

> plea and explicitly denying the fraud and combination, and the facts upon which the charge is founded,"

made it necessary for this appellee as a defendant to accompany its demurrer with an answer, as it did, and it was proper to incorporate in its answer the demurrer for multifariousness. This is especially true where the petition, as in this case, is so artfully drawn that the defense raised by the demurrer is not apparent without explanation, thus making the demurrer unavailable.

That the defense of multifariousness may be properly raised by answer has been recognized by this Court in Oliver, *et al., v.* Piatt, 3 How., 333. The Court (at p. 412) said:

> "The objection of multifariousness cannot, as a matter of right, be taken by the parties, except by demurrer, or plea or *answer;* and if not so taken, it is deemed to be waived." (The italics are ours.)

Again, in Heffner *v.* Northwestern Life Ins. Co., 123 U. S., 747 (p. 751), the Court says:

> "Multifariousness as to subjects or parties, within the jurisdiction of a court of equity, cannot be taken advantage of by a defendant, except by demurrer, plea or *answer to the bill,* although the court in its discretion may take the objection at the hearing, or on appeal, and order the bill to be amended or dismissed." (Italics are ours.)
>
> Citing Oliver *v.* Piatt, *supra,*
> Nelson *v.* Hill, 5 How., 127, 132.

In the case of Virginia *v.* West Virginia, 206 U. S., 290, the objection of multifariousness was made and this Court in that case (p. 322) postponed the consideration of the question until the final hearing. This is, as appears from the opinion of Lanning, *J.* (Record, Vol. I, p. 442), pre-

cisely what the Circuit Court did in this case. The appellee is not responsible for the fact that the consideration of the question raised by the demurrer in its answer was postponed until the final hearing and then apparently disregarded by the Court below on the theory that the defense was not interposed in time, and this Court may and should take the matter of this defense into consideration in the determination of this appeal.

IV.

THE FACT THAT THIS APPELLEE DID NOT APPEAL FROM THE DECISION OF THE COURT BELOW AND ASSIGN AS ERROR THE ACTION OF SUCH COURT IN REFUSING TO SUSTAIN THE OBJECTION OF MULTIFARIOUSNESS DOES NOT PREVENT THIS APPELLEE FROM PRESSING THE OBJECTION NOW.

If by the language used in the brief for the United States (p. 363), it is intended to include this appellee, the position taken by counsel cannot be maintained. The only case cited in support of the position that the objection cannot now be pressed is Bitterman *v.* Louisville & N. R. Co., 207 U. S., 205. It is true that in that case the Court said, at page 226:

> "The proposition that the bill was multifarious because of the misjoinder of parties and causes of action was not assigned as error in the Circuit Court of Appeals, and, therefore, might well be held not to be open."

But it was the *appellant* in that case who was asking the Court to consider an error that ought to have, but had not, been assigned in the Circuit

Court of Appeals. And it will be observed that nevertheless the Court *did* proceed to consider and pass upon the alleged error.

And, moreover, even where the party attacking the judgment fails to assign errors, this Court has the option under its own rules, 35 and 21, to examine the record to ascertain if there are errors not assigned as required by sections 997, 1012, Rev. Stat., but so plain as to demand correction.

Columbia Heights Realty Co. *v.* Rudolph, 217 U. S., 547.

If this Court is at liberty to consider, in behalf of a party seeking the reversal of a judgement, an error which he had the opportunity but failed to assign, *a fortiori,* is it at liberty to consider, in behalf of an appellee seeking to sustain a decree in its favor, an error which it has had no opportunity to assign because it had nothing to appeal from, and which, if not considered, may deprive it of the only ground upon which the decree can be sustained.

The decree here may be sound, but rendered by the Court below upon erroneous grounds; and the defense rejected by the Court below may be the only ground upon which its decree could be sustained.

In McClurg *v.* Stillman, 6 Wheat., 598, Mr. Justice Johnson said, at page 603:

> "And, notwithstanding express evidence to the contrary, this Court feels itself sanctioned, in referring the decision of the State Court, in this case, to the ground on which it ought to have been made, instead of that on which it appears to have been made. The question before an appellate court is, was the *judgment* correct, not the *ground* on which the judgment proposes to proceed."

In Ridings *v.* Johnson, 128 U. S., 212, this Court said, on page 218:

> "But, on an appeal in an equity suit, the whole case is before us, and we are bound to decide it so far as it is in a condition to be decided. The bill was dismissed on demurrer for want of jurisdiction. Though the Court below may have erred in dismissing it on this ground, yet if we can see that there is any other ground on which it ought to be dismissed, for example, want of equity on the merits, we must affirm the decree. This makes it necessary that we should go into a further examination of the case made by the bill and supplemental bill."

The allowance of an appeal removes the whole cause to this Court.

Ridings *v.* Johnson, 128 U. S., 212, 218.

United States *v.* Rio Grande Dam & Irrigation Co., 184 U. S., 416.

Hitz *v.* Jenks, 185 U. S., 155, 170.

V.

THE CIRCUIT COURT PROPERLY DISMISSED ON THE MERITS THE PETITION SO FAR AS THE SAME AFFECTED THE MATTERS WHEREIN THIS APPELLEE IS CONCERNED, AND ITS DECREE IN THAT REGARD SHOULD BE AFFIRMED BY THIS COURT.

On this point we beg leave to adopt the briefs filed by counsel for the Erie Railroad Company, the New York, Susquehanna & Western Railroad Company and the Pennsylvania Coal Company.

Respectfully submitted,

WILLIAM W. GREEN,
Of counsel for The Mercantile Trust Company, Appellee.